BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF TAOS, Petitioner,	)	
v.	)	Docket No. 357
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: September 8, 1965

Appearances:

On behalf of the petitioners:
Richard Schifter,
Darwin P. Kingsley, Jr.,
Frank E. Karelsen, III.

On behalf of the defendant:
Howard G. Campbell, with whom
was Mr. Assistant Attorney General
Edwin L. Weisl, Jr.

OPINION OF THE COMMISSION

Watkins, Chief Commissioner, delivered the opinion of the Commission,

The Pueblo of Taos is an American Tribe of Indians residing in the State of New Mexico. It has been recognized by the United States as an organized tribe, capable and with the right to file a claim with this Commission.

The petition filed includes two distinct claims. The first is based on an alleged taking by the defendant about 1906, without compensation, of land which the claimant was in the possession of under a claim of Indian title.

The second claim alleges a taking by the defendant in 1927, without compensation, of land to which petitioner had recognized title.

The first claim covered an area of approximately 300,000 acres, located in Taos, Colfax, and Mora Counties, New Mexico, which is delineated in detail in our Finding No. 3. Within the area of the metes and bounds description, but at no time a part of it, is the so-called Spanish Taos Pueblo Grant which was confirmed by the United States by the issuance of a patent to petitioner in 1864.

Sometime after the petition was filed, we decided, in another case, that a claim based on Indian title cannot be the basis of an award if the area in question had been the subject of a Spanish land grant which was subsequently confirmed by the United States, Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422 (1959). By reason of this decision there are eight Spanish Land Grants in conflict with petitioners first claim. Petitioner now agrees that the areas included in said grants should be excluded from said claim. These grants are:

(1) the Maxwell Grant;
(2) the Rancho del Rio Grande Grant;
(3) the Christobal de la Serna Grant;
(4) the San Fernando de Taos Grant;
(5) the Gijasa Grant;
(6) the Martinez or Godoi Grant;
(7) the Antoine Leroux Grant; and
(8) the Arroyo Hondo Grant.

So, if these 8 land grant areas, plus the Taos Pueblo Grant are deducted from the area which petitioner claimed, two separate areas covering approximately 130,000 acres are left for consideration in this first claim. These remaining areas are bounded as follows:

1. Eastern Area

From the intersection of the southeast boundary of the Antoine Leroux Grant with the north boundary of the Taos Pueblo Grant northeasterly along the southeast boundary of the Antoine Leroux Grant to the intersection of the southeast

boundary of the Antoine Leroux Grant with the southern boundary of the Lucero de Godoi Grant; thence easterly and northerly along the south boundary and the east boundary of the Lucero de Godoli Grant until it again intersects the southeastern boundary of the Antoine Leroux Grant; thence northeasterly and northwesterly along the eastern boundary of the Antoine Leroux Grant to Simpson Peak; thence easterly to Taos Cone; thence northeasterly to Red Dome; thence in a generally southerly direction along the county line between Taos County and Colfax County as far south as the southwestern corner of the Maxwell Grant; thence due east along the southern boundary of the Maxwell Grant for approximately one and one-half miles to a point due north of San Antonio Church; thence due south to Coyote Creek; thence southeasterly and southerly along Coyote Creek to Black Lakes; thence due south to the north boundary of the Mora Grant; thence due west along the county line between Colfax County and Mora County to the eastern boundary of the Rancho del Rio Grande Grant; thence in a northeasterly, a northwesterly and a southwesterly direction along the north boundary of the eastern and northern boundaries of the Rancho del Rio Grande tract to the point where the Rancho del Rio Grande boundary touches the eastern boundary of the Cristoval de la Serna Grant; thence in a northeasterly and northerly direction along the eastern boundary of the Cristoval de la Serna Grant to the point where that boundary touches the San Fernando de Taos Grant; thence southeasterly and thereafter northerly along the boundary of the San Fernando de Taos Grant until the latter touches the southern boundary of the Taos Pueblo Grant; thence due east along the southern boundary of the Taos Pueblo Grant, thence due north along the eastern boundary of the Taos Pueblo Grant; and thence due west along the northern boundary of the Taos Pueblo Grant to the point of beginning.

2. Western Area

From the point where the Arroyo Hondo meets the Rio Grande River at approximately 36 degrees 31 minutes north latitude, in a southerly direction along the Rio Grande to the point where another Arroyo Rondo meets the Rio Grande at approximately 36 degree 19 minutes north latitude; thence from the mouth of this Arroyo Hondo in a northwesterly direction and northerly direction to Tres Orejas; thence northerly to Cerro de los Taoses; thence easterly to the point of beginning.

We have found that the petitioner held Indian title to these two areas asserted in the first claim on the dates when they were taken, to-wit: the 7th of November 1906, by defendant without compensation to the Taos tribe.

REASONS FOR FINDINGS AND CONCLUSIONS

As required by the Indian Claims Commission Act, Section 19(3), we now state the reasons for the findings and conclusions we have entered:

First Claim

The petitioner presented three major divisions of evidence to establish exclusive possession and use from time immemorial or for a long time, otherwise known and referred to as Indian title. The first was testimony of Taos Indian witnesses. The boundaries of the claimed area were quite well defined in the minds of the elderly Indians who were interviewed by Dr. Ellis, archaeologist and historian who testified before the Commission in behalf of the petitioner. In describing her interview with the elderly Indians, Dr. Ellis testified, "The various other elderly men who were listening occasionally made comments, and moved spots a half inch in one direction or another on the map until we got the material down as accurately as could." (1962 Tr. 65. See also Pet. Ex. 84, pp. 77-78)

Relevant biographical information concerning these elderly Indians is set forth in some detail by Dr. Ellis in Pet. Ex. 84, pp. 78-84. Briefly, all of the following were or are members of the Pueblo Council and testified with respect to their own personal experience and the

experience of their grandfathers: Serferino Martinez, who was 65 years old when he testified before the Commission in 1953 concerning use of the area east of Taos Pueblo; John Concha, who was 75 when he testified before the Commission in 1954 concerning use of the area south of the Taos Pueblo; Manuel Cordova, who was 72 years old when he testified in 1954 with respect to use of the area lying west of Taos Pueblo, including the claimed land west of the Rio Grande; Julian J. Lujan, who was 70 in 1953 when he appeared and testified as to the use of the eastern area; Antonio Mirabal, who was 91 years old when he testified before the Commission in 1956 with respect to the Town of Taos claim and the Blue Lake region; Hilario Reyna, who was 65 at his 1956 appearance concerning land use and relations with other tribes; and Cesario Romero, who was 64 in 1953 when he appeared before the Commission and testified with respect to use of the eastern and southern lands. In effect each of these witnesses testified that the area about which he was testifying was in the possession of and used exclusively during his lifetime for beneficial purposes by the Taos Indians, and that it was a tribal tradition that the area had been so used by his ancestors from time immemorial.

Locations mentioned by these witnesses were parts of either one or the other of the subject tracts which are claimed by virtue of Indian title. The use of the land by these Indians helped establish the boundaries. Knowledge of these boundaries was transmitted from generation to generation, generally by the grandfathers of the Taos

Pueblo. Thus this knowledge became a tribal tradition. For testimony of these witnesses see Transcript of September 8, 1954, and December 13, 1956; also Petitioner's Exhibit 84, pp. 78-84.

Dr. Ellis, who was familiar with other Indian peoples, testified that the attitude of the Taos Indians toward land they considered their own was quite different from that of the nomadic Indians. The relationship of the Taos Indians toward other land "is closer to that of our agricultural society." (Tr. 1962, p. 52) Dr. Ellis' generalization, with which we agree, can be expanded and illustrated from our findings in the instant case and from other cases which we have considered.

The Taos Indians' use of the subject areas began, according to their tradition, sometime in the year 1300, While the evidence shows that these Indians relied heavily on agriculture for subsistence, they did not do so entirely. Much of their areas had an altitude of about 7,000 feet, which meant a short growing season of 100 days. Because of this situation, they relied less on farming than the other Pueblos to the south and used hunting and gathering to supplement their needs.

Nevertheless, they lived in the general Pueblo pattern. They established the central village of Taos as a permanent home for the tribe, which according to the Indian witnesses and traditions, has remained continuously occupied from that time to the present day. They also occupied a well defined area surrounding the village which they used for farming, grazing, hunting and other purposes. The area claimed consisted of about 300,000 acres. From the date of its establishment to the present day, their permanent home, together with the

surrounding areas which they used, has been their only home and source of subsistence. Except for the communal dwellings in which they were housed and the surrounding areas which were used in common, they had many of the characteristics of the early white settlers who had villages with surrounding fields privately owned, but with grazing areas publicly used.

Under the circumstances then, the attitude of the Indians toward the land they considered their own would undoubtedly be very similar to that of the white settlers toward their villages, homes and supporting farm lands. Thus there would come into being community and private traditions which would have higher probative value than would be the case with Indian tribes which had no permanent dwelling or villages and who traveled extensively in search of game and gathered over wide areas, often in conflict with neighboring Indian tribes. With these nomadic Indians it would be unlikely that they would have the same attachment to their lands and homes as would the Taos and other Pueblo Indians.

This contrast may be the explanation of what appears on its face to be a contradiction of rulings in a number of cases before this Commission, as well as before the Court of Claims, where the Commission has taken a dim view of so-called informant testimony from Indians who had a financial interest in the outcome of these cases, and who were

very vague with respect to what they have been told by elderly Indians. In other words, these statements were not based on well founded traditions.

With all this in mind, we believe considerable weight should be given to the Indian witnesses testimony in this case. No Indian witnesses were offered by the defendant to rebutt petitioner's Indian testimony. (See Zia case, supra)

Expert Witnesses

The next line of evidence is that received from expert witnesses and it is relevant principally with respect to the claim based on Indian title. Dr. Florence Ellis, anthropologist and archaeologist, and Dr. Myra Jenkins, historian, appeared in behalf of the petitioner and Dr. Harold H. Dunham, historian, appeared in behalf of the defendant.

Dr. Florence Ellis of the Department of Anthropology, University of New Mexico, received her Ph.D. at the University of Chicago in 1934. After receiving her doctorate Dr. Ellis taught at the University of New Mexico and spent the summer of 1940 and 1941 living in the Taos areas and doing research on the Spanish-American cultures in that area. She testified as an expert witness for the petitioner and stated that the Taos Indians first entered the areas claimed by petitioner about 1300 and established a village located near the present site of Taos Pueblo village (Tr. 1962, pp. 34, 37, 76, 77). Dr. Ellis' testimony and report are based upon archaeological and legendary evidence gathered during her work among the Taos people, which she contends establishes here and when the ancestors of the present Taos settled, how long they remained

and in what activities these Indians engaged. On cross examination Dr. Ellis stated that the area claimed by petitioner and designated in Finding 3, was exclusively used by the petitioner in 1848 (Tr. 1962, p. 145). Detailed findings of Dr. Ellis' archaeological excavation and the great amount of work she put in are reported in Pet. Ex. 84, particularly on pages 27 through 76, and Findings 4 through 14.

Petitioner's expert historian, Dr. Myra Jenkins, who obtained her Ph.D. from the University of New Mexico and has done extensive work in Latin America, Mexico, and New Mexico, supported the testimony of the Indian witnesses and Dr. Ellis, showing that the Taos Indians exclusively used and possessed the lands claimed by them for hunting, gathering, farming and grazing from time immemorial (Pet. Fdgs. 5 through 12; Tr. 1962, pp. 409-444).

Dr. Harold H. Dunham, who received his Ph.D. from Columbia University appeared as an expert historical witness for the defendant. He is the author of a book entitled, "Spanish and Mexican Land Policies and Grants in the Taos Pueblo Region New Mexico" which was introduced into evidence as Def. Ex. No. 100. From his testimony it is evident that Dr. Dunham has done extensive research on New Mexico Territory history. He cites the following authorities, all of which were introduced in evidence as exhibits. Brayer, Exs. 49, 107; Hodge, Ex. 51; Jeancon, Ex. 70; Bandlier, Ex. 66; Miller, Ex. 75; Parsons, Ex. 76; Twitchell, Exs. 85, 137, 138, and 140-149; Grant, Exs. 113, 114; Hall, Ex. 116;

Hammond, Ex. 118; Hacket, Ex. 116; Bancroft, Ex. 105; Stanley, Ex. 133; White, Ex. 150; and Adams and Chaves, Ex. 103.

Dr. Dunham testified that by 1800 there were approximately 3½ times as many Spanish as Indians in the areas we are concerned with, and by 1846 to 1848 the Spanish outnumbered the Indians 6 to 1 and were much stronger than the Indians, especially in the field of armament and defendant therefore assumed that the Indians could not have exclusively used and occupied the areas they now claim (Def. Exs. 100, 113, 114; Tr. 1962, pp. 259-264).

Petitioner replies to this claim by stating that even though the Spanish outnumbered the Indians by 1848, and even though they had sufficient force and power to take any land they wished from the Pueblo Indians, they did not do so, but took the bottom land and left the hilly uplands to the exclusive use and occupancy of the Indians because they had no use for the mountainous areas. It must be remembered that comparative population figures can suggest the relative rights in land only if the groups compared have similar modes of living and thus similar patterns of land use. Where, as in this case, we are comparing townspeople and farmers of European extraction with an Indian group which farms for two-thirds of its livelihood and relies on hunting and gathering for the remaining third, no sound conclusions can be derived from population figures alone.

The fact is that in 1850, petitioner, with 25 percent of the area population, claimed and used less than 50 percent of the land in the Taos valley, from Arroyo Hondo to Hondo Canyon and from the Río Grande to the crest of the Sangre de Cristo. This surely is not out of line, especially when it is recognized that most of the area claimed by Indian title is mountainous and unfit for farming or sheepherding. The Spanish preferred the bottom lands where they could farm and tend their flocks of sheep and had no real need or desire for the upper mountaenous lands which the Taos Indians inhabited.

The defendant contends that the royal grant to the petitioner, by the strongest possible implication, limited the Indians to tracts granted (Def. Pro. Fdg. 17; Def. Brief, para. 10, p. 43). However, the Court of Claims has expressly ruled on this point in Pueblo de Zia v. United States, Slip Opinion p. 2, Appeal No. 9-62 (1964). In that case the Court states that the petitioner therein could present a valid claim based on aboriginal title to public lands despite the fact that the petitioners involved had received a valid Spanish Grant of another parcel of land.

In the instant case petitioner originally claimed an area of some 300,000 acres but because of the holding in Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422, in which it was decided that a claim based on aboriginal Indian use and occupancy could not be the bases of an award under the Indian Claims Commission Act if the area in question was

covered by a Spanish land grant which was subsequently confirmed by the United States, petitioner agrees that the eight Spanish land grants enumerated in Finding 3 must be subtracted from its claim of aboriginal title, leaving approximately 130,000 acres claimed under aboriginal title.

The Commission concludes that in view of the decision reached by the Court of Claims in the Zia case (supra) that petitioner may maintain an additional claim for additional areas other than that land contained in the valid Spanish land grants.

The Commission also concludes that the pattern of use described in Findings 4 through 14 existed in 1848 in the areas described in the last two paragraphs of Finding 3 and that it continued with few encroachments until the establishment of the Forest Reserve about the year 1906, when the United States informed the Pueblo of Taos that the land which the Pueblo considered its own was now public land of the United States.

Defendant introduced no evidence contradicting the findings of Dr. Ellis and seems willing to concede the accuracy of her testimony (Tr. 1962, pp. 144-145) but maintained that such testimony should be received only as background since the function of anthropology is to construct a history where none as such exists, and that since such history exists in the present case, little or no weight should be given to Dr. Ellis' testimony; that such testimony should be received and considered, if at all, as stated above, as background or as it may particularly illuminate the areas of religion and customs. However, this Commission

and the Court of Claims have repeatedly held that this type of evidence is entitled to consideration on the issue of Indian title. In Pawnee Tribe of Oklahoma v. United States, 124 Ct. Clms. 324, the Court of Claims stated,

> The Indian Claims Commission Act reflects the intent of Congress that the cases arising under that Act should be decided on a complete and full record concerning all the ascertainable facts.

And in the Snake or Piute Indians v. United States, 125 Ct. Clms. 241, the Court stated:

> The problem of establishing such exclusive occupancy title by immemorial possession as of a date too remote to admit of testimony of living witnesses, and where no deeds or patents exist, is not a simple one. At best, the ultimate fact of beneficial ownership by exclusive possession and occupancy can only be inferred and found from many separate events and a variety of documentary material . . ., evidence of an expert type from anthropologists and historians, correspondence in the records of various Government departments and officials with reference to or having a bearing on the tribe or the area in question, and, in fact, anything having any relevance which can be unearthed.

In reviewing the expert testimony the Commission agrees with the petitioner that the defendant's evidence concentrates upon such events as governmental policies and individual exploits and that it is necessary and proper to go beyond this and utilize all possible evidence to determine what lands the Taos Indians did or did not hold by reason of Indian title on the critical dates in this proceeding.

We believe that the expert testimony of Dr. Florence Ellis should be given considerable weight because of her archaeological work in the field which furnished strong evidence of the presence of Taos Indian

villages and activities in the claimed area, continuously or for a long time prior to and including 1848 when United States sovereignty came into being in the area. This evidence is more completely set out in our Findings 4 through 14. Mr. Ellis also gave her opinion as an expert anthropologist that the Taos Indians in effect had Indian title to the claimed area.

The testimony of Dr. Myra Jenkins supports and confirms to a considerable extent the testimony and documentation of Dr. Ellis.

With regard to the expert historical witness of the defendant, Harold H. Dunham, the Commission concedes that he has done considerable research on the question under discussion, but feels that neither his testimony nor his documentary work refute the evidence presented by the petitioner, since both his testimony and his documentary evidence deals with matters that have already been ruled on by this Commission in the Zia case (supra) or pertain to matters that are not relevant to the question of Indian title.

Documentary Evidence

There is other evidence in existence which supports the Pueblo claim and this is documentary material taken from Government files. Here we find repeated statements of Government officials that the Pueblo of Taos have used the claimed land since time immemorial. These statements were made by men who were in the area and who were thoroughly familiar with the facts (Pet. Fdgs. 21-22; Pet. Exs. 1-4, 6, 82; Tr. pp. 29-31, 91-97).

What these documents establish is that the Pueblo Indians had been left undisturbed in the use of their aboriginal hunting, grazing and gathering lands until the first decade of the 20th century. It was only when the Forest Reserves were created that the Indian people were told that these lands could no longer be used by them without restrictions. This limitation on the Pueblo Indians created a great deal of furor, resulting in an investigation by the Bureau of Indian Affairs. The Bureau did, in fact, find that the creation of the Forest Reserves had caused the Pueblo Indians to be squeezed out of their ancient lands and urged that certain portions of the lands be returned to the Pueblos in the form of an Executive Order Reservation. The Government documents received in evidence which support this view are as follows: Pet. Exs. 1-5, 6-7, 13-14, 22-24, 28, 33-35, 39, 40-47, 50, 52-53, 57-58, 63, 72, and 82. However, these exhibits deal for the most part with factual situations similar to those presented in the _Zia_ decision, (supra) or refer to matters irrelevant to this proceeding.

In summation, defendant has based its defense on these points:

(a) The population of the area during the critical date of 1848 showed that the Spanish outnumbered the Indians by 6 to 1. Petitioner answered this argument by pointing out that the Spanish, regardless of their much larger population, preferred and used what to them seemed the more desirable bottom land and left the mountainous areas to the exclusive use and occupancy of the Indians. On this point the logic of the situation is clearly with the petitioner.

(b) Defendant next contends that the Royal Spanish Grant limited the petitioner to the area contained in the grant. However, this defense is ruled out by reason of the Court of Claims decision in the *Zia* case (supra).

(c) Defendant then questions whether the evidence received supports the claim of Indian title urged by petitioner. But defendant introduced no evidence rebutting the testimony of Dr. Ellis and Dr. Jenkins, the traditions of the Taos Indians that they had occupied and used the areas for a long time, and the documentary evidence which largely supports the testimony of the expert witnesses and the Taos traditions.

Thus, there is not only substantial evidence supporting our finding 19 awarding the subject tracts* to petitioner but we are convinced there is a clear preponderance of evidence supporting our decision.

Petitioner's Second Claim Designated: Town of Taos Claim

The background and history of petitioner's second claim is fully set out in Findings 20 through 24 and is not contradicted, therefore it will not be repeated here. The defendant argues, however, that Congress has acted on this matter and thus the Indian Claims Commission is without jurisdiction. Defendant offered no further defense. We do not agree

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*It should be mentioned that technical errors were discovered in the descriptions of the areas of land contained in Finding 3. These errors were called to the attention of counsel for petitioner and defendant and without objection were corrected by the Commission.

with defendant's contention. The issue before the Commission in many other cases and again in this case is whether the action of Congress properly disposed of the matter. The very purpose of the Indian Claims Commission Act was to review the action of Congress as well as of the Executive branch in dealing with the property of Indians. See 25 U.S.C. §702, authorizing the Commission to hear claims arising under the laws and treaties of the United States; Otoe and Missouria Tribe v. United States, 131 Ct. Cls. 593 (1955).

Defendant does not dispute that under the provision of the Pueblo Lands Act petitioner should have received $297,684.67 as compensation for the loss of the land in the Town of Taos and that this amount has never been paid (Def. Br. p. 29). Defendant agrees that the only condition on which petitioner ever offered to waive its right to that amount was if it received "title to the Blue Lake Area" (Def. Ex. p. 11). Finally, defendant agrees that a Senate Committee recommended acceptance of petitioner's offer but that Congress failed to pass the bill proposed by the Committee (Def. Br. p. 12). What Congress finally did was to give petitioner a use permit for the Blue Lake Area, much less than it asked for when it agreed to waive its rights to almost $300,000.

We are thus dealing here with an unpaid debt of the United States in the amount of $297,684.67. As already stated, the mere fact that Congress has acted in this general area has not removed the debt from the jurisdiction of the Commission. Nor has petitioner ever released

defendant from this debt or agreed to waive it or formally to accept a compromise settlement. The evidence shows that petitioner was prepared to waive its rights to the amount of $297,684.67 in return for title to the Blue Lake Area. It received neither.

Based on this reasoning the Commission holds that under the provisions of the Indian Claims Commission Act, it does have jurisdiction over the matter identified as Petitioner's Claim No. 2. The Commission also holds that the defendant is liable to the petitioner on its second claim for the amount of $297,684.67, less the value of the use permit referred to in Finding 23, less offsets.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner